No. 94-6615

In The

Supreme Court of the United States

October Term, 1994

CARL THOMPSON,

Petitioner,

vs.

PATRICK KEOHANE, Warden, BRUCE M. BOTELHO, Attorney General, State of Alaska,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS

BRUCE M. BOTELHO
Attorney General

CYNTHIA M. HORA
Assistant Attorney General
Counsel of Record
Office of Special Prosecutions and Appeals
310 K Street, Suite 308
Anchorage, Alaska 99501
Telephone: (907) 269-5250

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. In a habeas proceeding brought by a state prisoner, is a state court's determination that a person is not in custody under *Miranda v. Arizona*, 384 U.S. 436 (1966), an issue of fact subject to the presumption of correctness mandated in 28 U.S.C. § 2254(d)?

2. Assuming the presumption of correctness does not apply, does *de novo* review lead to the conclusion that Thompson was not in custody during the interview at the trooper office?

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STATUTORY AND RULE PROVISIONS

28 U.S.C. § 2254(d):

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate indicia, shall be presumed correct[.]

Federal Rule of Civil Procedure 52(a) provides:

> FINDINGS BY THE COURT; JUDGMENT ON PARTIAL FINDINGS (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and

STATUTORY AND RULE PROVISIONS – Continued

> conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

STATEMENT OF THE CASE

On August 11, 1986, Carl K. Thompson stabbed his former wife Dixie Thompson twenty-nine times, killing her. [JA 3, 26] The murder took place at Thompson's home on the outskirts of Fairbanks, Alaska. [JA 3] That same day, Thompson wrapped Dixie's body in a bedspread and tent fly, weighted it down with chains, and dumped it in a gravel pit lake off the Elliott Highway. [JA 3] He threw the murder weapon and Dixie's personal belongings into a public dumpster. [JA 3]

The Alaska State Troopers learned of the murder a month later, on September 10, 1986, when two moose hunters found Dixie's body floating in the gravel pit lake. [JA 3, 10, 26] Because Thompson had disposed of Dixie's personal effects, the troopers did not know the dead woman's identity. [JA 3, 11, 26] The troopers issued a press release describing a unique tattoo on the body – a heart with the name "Carl" on the left chest – and asking the public for assistance in identifying the woman. [JA 4, 11, 26] Thompson's girlfriend urged Thompson to call the troopers, and he did so. [JA 4, 11] Thompson told the troopers that his former wife fit the description of the dead woman, and that he had not seen her since the middle of August when he had taken her to the airport. [JA 4, 11; Transcript of telephone conversation between Thompson and Trooper Barnard on 9/11/86 at 5:11 p.m.] Thompson expressed concern for his former wife's well-being and asked the troopers to call him back as soon as any information became available. [JA 4; Transcript of telephone conversation between Thompson and Trooper Barnard on 9/11/86 at 5:11 p.m.]

Thompson called the troopers again the next day, September 12, inquiring whether there were any developments in the investigation. He talked freely about his relationship with his former wife and expressed his desire to cooperate in the investigation. [JA 4; Transcript of telephone conversation between Thompson and Trooper Barnard on 9/12/86 at 3:15 p.m.]

A dental examination established that the dead woman was in fact Dixie Thompson. [JA 11, 26] By September 15, 1986, the troopers had recovered some of Dixie's belongings. They had also received information which led them to suspect Thompson had killed Dixie. [JA 26] Trooper Chris Stockard telephoned Thompson and asked him to come to the trooper office to identify some jewelry and other items they believed belonged to Dixie. [JA 11, 26] It was undisputed that Trooper Stockard's primary reason for contacting Thompson was to question him about the murder, but Stockard did not relate this to Thompson. [JA 26] Thompson agreed to go to the office, but said he wanted to shower first. [Transcript of telephone conversation between Thompson and Trooper Stockard on 9/15/86 at 10:16 a.m.]

Thompson voluntarily drove to the trooper office in his own vehicle. No trooper accompanied him, even in a separate car. He arrived at approximately 11 a.m. and left his dog in the truck when he went inside. [JA 6, 26, 76] Trooper Stockard and another trooper interviewed Thompson for approximately two hours. [JA 6] The interview was tape recorded. [JA 6] The troopers were dressed in plain clothes, and there were no visible weapons. [JA 6] Trooper Stockard did not advise Thompson of his *Miranda* rights because he did not intend to arrest

Thompson at that time and did not consider Thompson to be in custody. During the questioning, Trooper Stockard repeatedly assured Thompson he was not under arrest, that he was free to leave at any time, and that he would be able to leave at the end of the interview. [JA 6, 27, 44-45, 49-52, 61, 74, 76-77] On several occasions, Thompson asked questions to confirm that he was in fact free to leave. [JA 6, 74, 76]

Thompson initially told the troopers that he knew nothing about Dixie's death. [See JA 49-71] Later in the interview Trooper Stockard confronted him with evidence linking him to the murder. [JA 45, 50-51] Thompson ultimately admitted stabbing Dixie, but he claimed he had acted in self-defense and in the heat of passion. [JA 6-7, 27] At the conclusion of the interview, Thompson was told he was free to go, but that his truck would be impounded and searched. [JA 6] Thompson was given the options of calling a cab, having a friend pick him up, or getting a ride from a trooper; Thompson accepted the offer of a ride and a trooper drove him and his dog home. [JA 6, 78-79] Thompson was arrested two hours later and charged with first-degree murder. [JA 6, 27]

While Trooper Stockard was interviewing Thompson at the trooper office, other troopers were executing a search warrant at Thompson's residence. [JA 11] Scientific testing revealed a large concentration of blood in the kitchen. [JA 11-12] The tread design on the tires of Thompson's truck were similar to tire impressions found at the gravel pit where Thompson had disposed of Dixie's body. [JA 12]

A grand jury in Fairbanks returned a two-count indictment charging Thompson with murder in the first degree in violation of Alaska Statute 11.41.100 and tampering with physical evidence in violation of Alaska Statute 11.56.610. [JA 10] Thompson filed a pretrial motion to suppress his confession on two grounds. First, he asserted that he should have been advised of his *Miranda* rights prior to the interview. Second, he alleged that his statement was not voluntary because the troopers played on his sympathies, minimized his guilt, and placed much of the blame for the homicide on the victim. [JA 5, 17]

The Alaska superior court judge denied the motion to suppress. Applying a reasonable person test to the facts, the trial court found that a reasonable person in Thompson's position would have felt free to leave the trooper office. Accordingly, the court concluded that Thompson was not entitled to *Miranda* warnings because he was not in custody. The court also concluded that the confession was voluntary. [JA 7-8]

Thompson was tried by a jury. The portion of his September 15, 1986, statement in which he admitted stabbing Dixie was played for the jury. [JA 19, 26] The jury found Thompson guilty of first-degree murder and tampering with evidence. [JA 12, 25]

The Alaska Court of Appeals affirmed Thompson's convictions on direct appeal. *Thompson v. State*, 768 P.2d 127 (Alaska App. 1989). [JA 10-23] The appellate court initially noted that Thompson's *Miranda* claim was not

really based on an assertion that he was in custody during the interview, but rather that Trooper Stockard had orchestrated a non-custodial situation in order to avoid having to advise Thompson of his *Miranda* rights. *Id.* at 130-31. [JA 16] In spite of the fact Thompson did not appear to be arguing he was actually in custody for *Miranda* purposes, the court of appeals addressed the issue and found, as did the trial court, that *Miranda* warnings were not required because a reasonable person in Thompson's position would have felt free to leave the trooper office and break off questioning. *Id.* at 131. [JA 16-17][1] The Alaska appellate court also rejected Thompson's claim that his confession was involuntary. *Id.* at 131-32. [JA 19][2]

Thompson sought discretionary review of the suppression issues. The Alaska Supreme Court denied his request. [JA 24]

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[1] It is not clear whether the Alaska appellate court accorded any deference to the trial court's finding that Thompson was not in custody. In later decisions, the Alaska Court of Appeals applied the clearly erroneous standard of review to trial court findings regarding *Miranda* custody. *See Higgins v. State*, 887 P.2d 966, 970 (Alaska App. 1994); *McKillop v. State*, 857 P.2d 358, 361 (Alaska App. 1993).

[2] The trial court imposed a ninety-nine year sentence for the murder and a consecutive five-year sentence for tampering with evidence. [JA 21, 25] On direct appeal, the Alaska Court of Appeals ruled that the five-year sentence for tampering with physical evidence should run concurrently with, not consecutive to, the murder sentence. *Thompson*, 768 P.2d at 133-34. [JA 23] On remand, the trial court imposed a composite sentence of ninety-nine years. [JA 26]

Thompson next filed a petition for writ of habeas corpus in the United States District Court for the District of Alaska, alleging that his confession was not voluntary and had been obtained in violation of *Miranda*. [JA 25] The magistrate judge applied the presumption of correctness contained in 28 U.S.C. § 2254(d) to the Alaska court's finding that Thompson was not in custody during the interview and rejected Thompson's *Miranda* claim. [JA 28-30] The magistrate judge also concluded that the record supported the state court's conclusion that Thompson's confession was voluntary. [JA 30] Based on these findings and conclusions, he recommended that the habeas petition be denied. [JA 31]

Thompson did not timely file objections to the magistrate judge's report and recommendation. On February 18, 1992, the district court judge accepted the magistrate judge's recommendation and dismissed Thompson's habeas petition. [JA 33-34] Thompson then sought leave to file objections. The district court judge vacated the dismissal order and considered Thompson's objections. [JA 35] The judge concluded that the Alaska court's finding that Thompson was not in custody was presumptively correct. After conducting a thorough and independent review of the record, he concluded that the confession was voluntary. The judge denied the habeas petition and, on December 8, 1993, entered judgment against Thompson. [JA 36-38]

Thompson appealed to the Ninth Circuit Court of Appeals. Relying on *Krantz v. Briggs*, 983 F.2d 961, 961-64 (9th Cir. 1993), the court ruled that the state court's determination that Thompson was not in custody was entitled to the presumption of correctness under 28

U.S.C. § 2254(d). [JA 41] Applying the presumption, the court concluded that there was fair support in the record for the Alaska court's finding. [JA 41] After conducting *de novo* review of the record, the court concluded that Thompson's will was not overborne and that his confession was voluntary. [JA 42] Accordingly, the Ninth Circuit affirmed the denial of Thompson's habeas petition. [JA 42]

Thompson filed a petition for certiorari, seeking review of the Ninth Circuit's ruling that the presumption of correctness applies to the state court's determination that he was not in custody for *Miranda* purposes. He did not seek review of the circuit court's ruling that his confession was voluntary. The Court granted the petition and ordered briefing.

SUMMARY OF ARGUMENT

1. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court held that the prosecution may not use statements made during the course of a custodial interrogation unless the prosecution demonstrates that the detained person was advised of and voluntarily waived the right to counsel and to remain silent. A person is in custody for *Miranda* purposes when a reasonable person in the defendant's position would have believed he was under arrest. *Stansbury v. California*, ___ U.S. ___, 114 S.Ct. 1526, 1529 (1994); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). In order to apply this objective standard to the totality of

circumstances in a given case, the trial judge must determine what happened during the interrogation. The circumstances surrounding a police interview are generally disputed, so the trial judge must consider evidence and decide what in fact occurred. The trial court, not an appellate court, is in the best position to resolve these factual disputes because the trial judge has the opportunity to view the witnesses' demeanor.

Although the trial court applies a legal test to a set of facts, the issue of *Miranda* custody is not a mixed question of fact and law. Most determinations in a lawsuit involve the application of a legal concept or standard to facts. When the determination of a given issue depends largely on the facts, a reviewing court defers to the trial court's assessment of the facts and limits its review to whether the trial court applied the correct legal standard. Because the issue of *Miranda* custody is intricately interwoven with the facts of a specific case, the trial court's determination that a person is not in custody for *Miranda* purposes is an "issue of fact." As such, the state court's finding is presumed correct under 28 U.S.C. § 2254(d), and a federal court should not overturn that finding unless the state court has applied an erroneous legal standard or the finding is not fairly supported by the record.

2. State court determinations on *Miranda* issues should be accorded deference on collateral review. *Miranda* is a prophylactic rule that results in the suppression of voluntary confessions. A person who voluntarily confesses to the police is not denied a fair trial when the jury

hears his confession. Nor does the admission of the voluntary statement violate the Fifth Amendment's prohibition against compelled statements. Because the state prisoner has not been grievously wronged, the principles of finality, federalism and fairness dictate a deferential standard of review of *Miranda* issues.

3. The choice of the standard of review makes no difference in the result in this case because application of the presumption of correctness and the *de novo* standard lead to the same conclusion – Thompson was not in *Miranda* custody when he was interviewed by the troopers. He agreed to go to the trooper office to discuss the death of his former wife. He drove there in his own vehicle. He was not restrained in any way, he was repeatedly told he was not under arrest and was free to leave, and he went home at the completion of the interview.

ARGUMENT

I. A State Court's Determination That A Person Is Not In Custody For *Miranda* Purposes Is An Issue Of Fact Subject To The Presumption Of Correctness Mandated By 28 U.S.C. § 2254(d)

In 1966, Congress enacted legislation limiting the federal courts' authority to conduct evidentiary hearings and overturn state convictions in habeas corpus proceedings. Congress adopted a "presumption of correctness" which federal courts must apply to state court determinations made after an evidentiary hearing. This presumption of correctness is embodied in 28 U.S.C. § 2254(d), which provides in pertinent part:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate indicia, shall be presumed correct, unless [one or more of eight enumerated circumstances apply].[2]

Congress did not specify which state court determinations are entitled to the presumption of correctness. The Court has held that the presumption of correctness applies to "issues of fact," but not to "issues of law," or to "mixed issues of fact and law." *See Miller v. Fenton*, 474 U.S. 104, 110 (1985). Unfortunately, as the Court has recognized in the habeas context as well as in the direct appeal context, the methodology for distinguishing between fact and law has been "elusive." *Id.* at 113. There is no test to accurately draw the line between questions of fact and conclusions of law. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) ("Nor do we yet know of any

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[2] The eight circumstances listed in § 2254(d) are: the merits of the factual dispute were not resolved at the state court hearing; the factfinding procedure was inadequate to afford a full and fair hearing; the material facts were not adequately developed; the state court lacked jurisdiction over the subject matter or over the applicant; the applicant was indigent and was deprived of his constitutional right to counsel; the applicant did not receive a full and fair hearing; the applicant was denied due process of law; or the state court factual determination is not fairly supported by the record.

other rule or principle that will unerringly distinguish a factual finding from a legal conclusion."). However, *Miller v. Fenton* provides some guidance:

> Perhaps much of the difficulty in this area stems from the practical truth that the decision to label an issue a "question of law," a "question of fact," or a "mixed question of law and fact" is sometimes as much a matter of allocation as it is of analysis. See Monaghan, Constitutional Fact Review, 85 Columb.L.Rev. 229, 237 (1985). At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question. Where, for example, as with proof of actual malice in First Amendment libel cases, the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court had been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law. Similarly, on rare occasions in years past the Court has justified independent federal or appellate review as a means of compensating for "perceived shortcomings of the trier of fact by way of bias or other factor. . . . "

In contrast, other considerations often suggest the appropriateness of resolving close questions concerning the status of an issue as one of "law" or "fact" in favor of extending deference to the trial court. When, for example, the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor,

> there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight.

474 U.S. at 113-14 (citations omitted).[3]

The Court has not yet decided whether the determination that a person is not in custody for *Miranda* purposes falls within the ambit of § 2254(d). Of the four circuits that have addressed the issue, the Eighth and Ninth Circuits have held that a state court's custody determination is an "issue of fact" which must be accorded the statutory presumption of correctness: *Feltrop v. Delo*, 46 F.3d 766, 773 (8th Cir. 1995), and *Krantz v. Briggs*, 983 F.2d at 961-64. The Tenth Circuit reviews the custody finding for "clear error," which is the same as presuming the finding to be correct: *Cordoba v. Hanrahan*, 910 F.2d 691, 693 (10th Cir.), *cert. denied*, 498 U.S. 1014 (1990). The Eleventh Circuit has conflicting decisions: *Purvis v. Dugger*, 932 F.2d 1413, 1419 (11th Cir. 1991), *cert. denied*, 503 U.S. 940 (1992), applied the presumption of correctness, while *Jacobs v. Singletary*, 952 F.2d 1282, 1291 (11th Cir. 1992), reviewed the facts *de novo*.

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[3] The Seventh Circuit examines the different functions of trial and appellate judges in determining whether a question is one of law or fact. *Mucha v. King*, 792 F.2d 602, 604 (7th Cir. 1986) ("But one cannot answer the question what is a 'fact' without first considering the purpose of the question. The purpose here is to draw the line between the trial judge's responsibility and our responsibility.").

Application of the principles set forth in *Miller v. Fenton* confirm the Eighth, Ninth and Tenth Circuit's decisions to accord deference to the state court's determination that a person is not in custody under *Miranda*.

A. The Trial Court Is In A Better Position Than An Appellate Court To Make The Custody Determination Because Resolution Of The Issue Involves The Credibility Of Witnesses And The Fact-Specific Application Of The Legal Definition Of Custody

In *Miranda*, the Court held that "[b]y custodial interrogation, we mean questioning initiated by law enforcement officers after a person had been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. Subsequently, the Court clarified that "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (*per curiam*) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). *See also Stansbury*, 114 S.Ct. at 1528-29; *Berkemer*, 468 U.S. at 440; *Minnesota v Murphy*, 465 U.S. 420, 430-31 (1984). When no formal arrest has occurred, the court applies an objective test: would a reasonable person in the suspect's position have believed that he was under arrest. *Stansbury*, 114 S.Ct. at 1529; *Berkemer*, 468 U.S. at 442 (1984).[4]

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[4] The Alaska trial and appellate courts applied the test for custody adopted by the Alaska Supreme Court in *Hunter v. State*, 590 P.2d 888 (Alaska 1979). *Hunter* adopted an objective test: whether a reasonable person in the suspect's shoes would

Judges in the federal and state courts examine the totality of the circumstances in determining whether a particular suspect is in custody for *Miranda* purposes. *Stansbury*, 114 S.Ct. at 1529. Relevant factors include: the location and physical surroundings of the interview; the language used by the officer to request the interview; whether the person came on his own or was escorted by police officers; the number of officers conducting the interview; the existence of any physical restraint, such as the drawing of weapons or the stationing of a guard at the door of the interview room; whether the person was told he was free to go; the demeanor of the officers; the extent to which the individual is confronted with evidence of guilt; the duration of the interview; the degree of pressure applied to the suspect; and whether the suspect left at the end of the interview. *See United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981); *People v. Dracon*, 884 P.2d 712, 717 (Colo. 1994); *People v. Foster*, 552 N.E.2d 1112 (Ill. App.), *appeal denied* 555 N.E.2d 380 (Ill. 1990); *Hunter v. State*, 590 P.2d 888, 895 (Alaska 1979); W. LaFave and J. Israel, *Criminal Procedure*, § 6.6, pp. 493, 498-99 (1984).

While these factors and others are relevant, no single factor is determinative. For example, *Miranda* warnings

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feel free to leave or break off questioning and, depending on the location, either leave or ask the police to leave. *Id.* at 895. *See also Long v. State*, 837 P.2d 737, 740 (Alaska App. 1992). Although phrased somewhat differently, the Alaska test is essentially identical to the test articulated by the Court. If anything, the Alaska test is more favorable to defendants. Thompson does not claim that the Alaska courts applied an erroneous standard to the facts.

are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Mathiason*, 429 U.S. at 495. *See also Stansbury*, 114 S.Ct. at 1530 (fact that the person is a suspect does not trigger *Miranda*); *Murphy*, 465 U.S. at 431 (same); *Beheler*, 463 U.S. at 1124-25 (Beheler not in custody for *Miranda* purposes when he accompanied police to station for 30-minute interview); *Beckwith v. United States*, 425 U.S. 341, 347-48 (1976) (*Miranda* warnings not required for interview in private home even though individual was suspected of wrongdoing). Moreover, some facts are irrelevant. For example, the subjective beliefs of the police officers about whether the individual is in custody are not relevant if they are not communicated to the person being questioned. *Stansbury*, 114 S.Ct. at 1529-30; *Berkemer*, 468 U.S. at 442.

The issue of custody is fact-bound. To evaluate the totality of the circumstances, a trial judge must determine when and where the interview occurred, how the defendant got to the place of questioning, how long the interview lasted, who was present during the interview, what the officers and defendant said and did, how the words were spoken, what the officers were wearing, the presence of any physical restraint, such as handcuffs or drawn weapons, whether the officers had any physical contact with the suspect, such as holding him by the arm, whether a guard was posted near the defendant or the interview room, and whether booking procedures were employed. In order to make these findings, the judge must consider actual evidence, either live testimony of the participants, or documents (as in Thompson's case, where the entire encounter was tape recorded), or both.

The judge must evaluate the demeanor of witnesses and their tone of voice to assess their credibility and decide what in fact happened.

After finding the historical facts, the trial court determines whether the individual was in custody for *Miranda* purposes. Because resolution of the custody issue in any given case involves a fact-specific application of the definition of "custody," the issue "falls somewhere between a pristine legal standard and a simple historical fact." *See Miller v. Fenton*, 474 U.S. at 114. Deference to the trial court's ultimate conclusion regarding the totality of the circumstances is warranted because the conclusion is "based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case." *See Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 289 (1960). The "close relationship of the [standard for custody] to the data of practical human experience, and the multiplicity of relevant factual elements, creating the necessity of ascribing the proper force to each" lead to the conclusion that the trial court's determination is entitled to the presumption of correctness. *Id.* at 289. *See also Purvis*, 932 F.2d at 1419 (presumption of correctness applied to state court's custody finding; "The state trial court was in the unique position, after observing [the defendant] and listening to the evidence presented at trial, to determine whether a reasonable person in [the defendant's] position would have felt free to leave the police station."); *United States v. Humphrey*, 34 F.3d 551, 558-61 (7th Cir. 1994) (Posner, C.J., concurring) (custody determination should be reviewed for clear error).

Treating *Miranda* custody as an issue of fact subject to the presumption of correctness is in accord with the Court's treatment of another *Miranda* issue. In *Murphy*, the Court referred to a trial court's finding that the defendant did not invoke his privilege against self-incrimination as a "factual finding." 465 U.S. at 424 n.3. *See also Bobo v. Kolb*, 969 F.2d 391, 397 (7th Cir. 1992) (determination whether suspect invoked his *Miranda* rights is factual finding subject to presumption of correctness).

California v. Prysock, 453 U.S. 355 (1981) (*per curiam*), further supports respondent's position that deference should be accorded to state court findings on the issue of *Miranda* custody. *Prysock* involved the adequacy of the warnings given. The Court reversed because the California appellate court had applied an erroneous standard. In granting review, the Court stated that "ordinarily this Court would not be inclined to review a case involving application of [*Miranda*] to a particular set of facts." *Id.* at 355. This statement strongly suggests that the Court accords deference to state court rulings on *Miranda* claims when the state court has applied the correct legal test to the facts.

B. The Presumption Of Correctness Applies On Habeas Review To Similar State Court Determinations Involving Fact-Specific Applications Of Legal Principles

Section 2254(d) is designed to serve the interests of federalism and finality by making state court determinations on issues of fact binding on federal courts on habeas review. In accordance with this purpose, the Court has broadly construed the term "issue of fact" to apply to

state court determinations that are based on witness credibility: *Demosthenes v. Baal*, 495 U.S. 731, 735 (1990) (*per curiam*) (state court's determination that inmate on death row was competent to waive his right to seek post-conviction relief entitled to presumption of correctness); *Wainwright v. Witt*, 469 U.S. 412, 429 (1985) (statutory presumption of correctness applies to trial court's determination that prospective juror should be excused for cause); *Patton v. Yount*, 467 U.S. 1025, 1036-37 (1984) (impartiality of individual juror subject to presumption); *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (*per curiam*) (state court findings regarding substance of ex parte communications and their effect on juror impartiality, and whether jury's deliberations as a whole were biased entitled to deference); *Maggio v. Fulford*, 462 U.S. 111 (1983) (*per curiam*) (determination of defendant's competency to stand trial reviewed under § 2254(d)); *Marshall v. Lonberger*, 459 U.S. 422, 431-37 (1983) (statutory presumption applies to findings that defendant received notice of and understood charges to which he entered guilty pleas); *Smith v. Phillips*, 455 U.S. 209, 218 (1982) (a state trial judge's finding that a juror's conduct did not impair his ability to render a fair and impartial verdict is subject to the presumption of correctness).

In *Miller v. Fenton*, the Court left open the question whether the presumption of correctness applies to state court findings regarding the waiver of *Miranda* rights. 474 U.S. at 106. Since then, three circuits have held that a state court's determination that a defendant knowingly and intelligently waived his *Miranda* rights is a question of fact that falls within the ambit of the statutory presumption. *See Washington v. Murray*, 952 F.2d 1472, 1482

(4th Cir. 1991); *Derrick v. Peterson*, 924 F.2d 813, 823 (9th Cir. 1990), *cert. denied*, 502 U.S. 853 (1991); *Perri v. Director, Dept. of Corrections, State of Illinois*, 817 F.2d 448, 451 (7th Cir. 1987). The Seventh Circuit reasoned that the determination involves basic or primary facts which turn on the credibility of witnesses who relate external events:

> Once a state court finds that a defendant understood each *Miranda* right, then the court has made the necessary subsidiary factual determinations to the conclusion that the defendant has made a knowing and intelligent waiver. Therefore, because the final conclusion of whether a waiver was intelligent is disposed of by a state court's ascertainment of subsidiary factual determinations, we conclude that it would be incongruous not to give this determination deference under 28 U.S.C. § 2254(d).

Perri, 817 F.2d at 451. *See also Bryan v. Warden, Indiana State Reformatory*, 820 F.2d 217, 220 (7th Cir.) (voluntariness issue requires determination whether the process was fundamentally fair, but waiver of rights inquiry more discrete and entitled to deference), *cert. denied*, 484 U.S. 867 (1987); *Fike v. James*, 833 F.2d 1503, 1506-07 (11th Cir. 1987) (*per curiam*) (§ 2254(d) applies to determination that the suspect initiated a conversation after an invocation of the right to counsel).

Juror impartiality, the competency of a defendant to stand trial and to waive his right to seek post-conviction relief, the defendant's understanding of the charges against him, and the defendant's understanding of his *Miranda* rights all involve fact-bound disputes. Because the trial judge is in the best position to evaluate the credibility of the witnesses who testify about the factual

disputes, the state court's ultimate determinations on these issues are subject to the requirements of § 2254(d). In the *Miranda* context, the demeanor of the officer and the defendant play an important role in determining what happened before, during and after the interview. The judge's credibility assessments and findings of historical fact go to the heart of the custody determination. The ultimate custody determination in any given case is peculiarly dependent on the facts and is unlikely to establish rules of future conduct. Accordingly, the sound administration of justice favors deference to the trial court's custody determination.[5]

That the custody finding ultimately is determinative of the *Miranda* issue in a given case does not warrant plenary review. As the Court noted in *Miller v. Fenton*:

> Equally clearly, an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question.

474 U.S. at 113 (citation omitted).

C. Fact-Bound Determinations Similar To The Custody Determination Are Accorded Deference By Reviewing Courts On Direct Appeal

A number of matters that involve the application of a legal rule to facts are given only limited review on direct

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[5] That the Alaska trial judge in Thompson's case did not hear live testimony because the interview was recorded does not lead to application of a different standard. In *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985), the Court held that the clearly erroneous standard applied "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts."

appeal. Rule 52(a) of the Federal Rules of Civil Procedure provides that these fact-bound determinations in a judge-tried case "shall not be set aside unless clearly erroneous." This standard of review is essentially the same as the presumption of correctness contained in § 2254(d).[6] Under these equivalent standards of review, an appellate court accords great deference to the district court or the state court findings and affirms unless there is no fair support in the record for the findings or the findings are

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[6] In his brief, Thompson mistakenly equates the clearly erroneous standard of review with *de novo* review. [Br. of Pet. at 18-19 & n.10] "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). The Court's description of the clearly erroneous standard on direct appeal is similar to the presumption of correctness in habeas cases:

> If the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.

Anderson v. Bessemer City, 470 U.S. at 573.

Similarly, in habeas cases, the presumption of correctness prohibits a federal court from simply disagreeing with a state court's view of the facts and substituting its own view. Thus, when two conclusions find fair support in the record, the federal court must defer to the state court finding. *Wainwright v. Goode*, 464 U.S. 78, 85 (1983) (*per curiam*). In *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 500 (1984), the Court even used the term "presumption of correctness" when referring to the clearly erroneous standard of Rule 52(a).

predicated on a misunderstanding of the governing rule of law.

In the Fourth Amendment context, the determination whether a person voluntarily consented to a search is based on the totality of the circumstances and is considered a question of fact. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). In the Fourteenth Amendment equal protection context, the trial court's determination whether the prosecutor, in exercising a peremptory challenge, intended to discriminate against a juror because of his race is a question of fact entitled to great deference on appeal. *Hernandez v. New York*, 500 U.S. 352, 365 (1991). As in the habeas context, the district court's conclusions concerning juror impartiality are reviewed for clear error. *Mu'min v. Virginia*, 500 U.S. 415, 428 (1991). *See also Amadeo v. Zant*, 486 U.S. 214, 225 (1988) (in habeas proceeding involving federal prisoner, the district court's conclusion that the prisoner's lawyer did not deliberately bypass an issue at trial is reviewed under the clearly erroneous standard). Appellate courts defer to the trial court's findings on these issues because they are based on the credibility of witnesses.

In voting rights cases, the trial court must determine whether there has been impermissible vote dilution in violation of the Voting Rights Act of 1965, 42 U.S.C. § 1973. Vote dilution, like *Miranda* custody, requires consideration of the totality of the circumstances. Because the circumstances vary depending on the facts of the case, the trial court is in a better position than an appellate court to make the determination. For this reason, the Court held that the clearly erroneous standard required reviewing courts to accord deference to the trial court's

determination. *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986).[7]

In *Anderson v. Bessemer City*, 470 U.S. 564 (1985), the Court explained why a trial court's determination regarding discriminatory intent is presumed correct on direct appeal:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of

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[7] In civil cases, a number of trial court determinations which involve the application of a legal standard to factual findings are subject to Rule 52(a)'s clearly erroneous standard of review: whether a plaintiff has demonstrated a pattern or practice of racial discrimination by a preponderance of the evidence, whether the defendants acted with discriminatory intent, whether an exemption to the Fair Labor Standards Act applies to a particular case, and whether an at-large voting system was being maintained for discriminatory purpose. *Bazemore v. Friday*, 478 U.S. 385, 398 (1986) (*per curiam*); *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 712-13 (1986); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). *See also Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1198 (6th Cir. 1988) ("A district court's ultimate and subsidiary findings concerning causation, negligence, nuisance, trespass, actual damages, and punitive damages, are all factual determinations included within the scope of Rule 52(a)." (footnotes citing cases omitted)); *Mucha v. King*, 792 F.2d 602, 605 (7th Cir. 1986) ("Although possession is a legal concept, whether particular 'facts' show possession is itself a 'fact' for purposes of separating the trial judge's function from our own. Negligence is another such fact. Facts of this sort, which are found by applying a legal standard to a descriptive or historical narrative, are governed by the clearly-erroneous rule."); 9A Wright and Miller § 2589, p. 612-20 (discussing and citing cases that apply the clearly erroneous standard to a number of issues involving fact-specific applications of legal principles).

> credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As has been stated in a different context [the habeas context], the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.' " *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

Id. at 574-75.

The same rationale applies to the *Miranda* custody issue in the habeas context. Duplication of the state trial judge's efforts in federal courts will contribute only negligibly to the accuracy of the determination, at a significant cost in judicial resources. Moreover, it would be too much to require state prosecutors, having persuaded a state trial judge and a number of state appellate judges that a defendant was not in custody for *Miranda* purposes, to persuade anew four federal judges (one district court and three circuit court) that the defendant was not in *Miranda* custody.

D. The Court Has Not Already Implicitly Decided The Question On Direct Review

Thompson argues that the Court has implicitly concluded that *Miranda* custody is subject to *de novo* review. [Br. of Pet. at 20-22] Thompson reaches this conclusion by

construing several decisions by the Court as having conducted independent review of the custody determination. However, an equally valid interpretation of those cases is that the Court determined that the lower courts had applied an erroneous legal standard to the facts. For example, the Court in *Stansbury* concluded that the California Supreme Court had violated the rules for determining whether a person is in *Miranda* custody by considering the officer's subjective belief regarding the person's status as a suspect. The Court did not independently review all of the facts and decide whether the defendant was in custody; it remanded to the California Supreme Court for a proper application of the rules. 114 S.Ct. at 1527-31. In *Illinois v. Perkins*, 496 U.S. 292 (1990), the Court rejected the argument that *Miranda* applies whenever a suspect is incarcerated on another offense and speaks with a person who, unbeknownst to the suspect, is a government agent. The Court did not independently review the totality of the circumstances surrounding the discussion between the suspect and the undercover government agent; rather, the Court determined that the lower court had read *Miranda* too broadly in relying solely on the fact of the suspect's incarceration. 496 U.S. at 297.

Similarly, the *Mathiason* Court held that the Oregon Supreme Court applied the wrong legal standard – whether the interview took place in a "coercive environment" instead of whether the defendant's freedom of movement was restricted to the degree associated with a formal arrest. 429 U.S. at 493. This reading is consistent with Justice Rehnquist's observation regarding *Mathiason* when he granted a stay of the state court judgment in *Fare*

v. Michael C., 439 U.S. 1310 (1978) (Rehnquist, J.): "In our most recent pronouncement [in *Mathiason*] on the scope of *Miranda*, we found the Oregon Supreme Court's expansive definition of 'custodial interrogation' read *Miranda* too broadly"). *Id.* at 1315. *See also Pennsylvania v. Bruder*, 488 U.S. 9, 10 (1988) (*per curiam*) (lower court did not apply legal test set out in *Berkemer*); *Berkemer*, 468 U.S. at 435-36 (deciding whether *Miranda* applies to the brief detention associated with a traffic stop); *Murphy*, 465 U.S. at 431-33 (state court expanded *Miranda* in concluding that *Miranda* warnings were required, not because probationer in custody, but because probation officer could compel probationer to answer questions); *Beckwith*, 425 U.S. at 343-44 (district court applied correct legal standard); *Beheler*, 463 U.S. at 1123-25 (state appellate court applied wrong legal standard).

E. Labeling An Issue A "Mixed Question Of Fact And Law" Does Not Necessarily Lead To *De Novo* Review

Thompson relies on language from *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963), for the proposition that the application of a legal standard to historical facts involves a mixed question of fact and law. He reasons that since the determination whether a person is in custody for *Miranda* purposes involves the application of a legal principle – "custody" – to a set of facts, it must be a mixed question of fact and law. Thompson reads the language in *Townsend v. Sain* too broadly. Application of such a broad reading would render virtually all issues subject to plenary review because resolution of nearly every issue that arises in a criminal or civil action involves the application

of some legal principle or some degree of legal reasoning. More importantly, Thompson's construction is in conflict with decisions the Court rendered after Congress responded to *Townsend v. Sain* and enacted the presumption of correctness.

For example, under Thompson's analysis, the issue of whether an individual juror can be impartial would be characterized as a mixed question of fact and law because it involves the application of a constitutional principle – impartiality – to the facts concerning a particular juror. But in *Patton v. Yount*, the Court held that the issue "is plainly one of historical fact." 467 U.S. at 1036-37. In a footnote, the Court observed:

> There are, of course, factual and legal questions to be considered in deciding whether a juror is qualified. The constitutional standard that a juror is impartial only if he can lay aside his opinion and render a verdict based on the evidence presented in court is a question of federal law, . . . ; whether a juror can in fact do that is a determination to which habeas courts owe special deference. . . .
>
> The dissent misreads the Court's opinion in *Reynolds v. United States*[, 98 U.S. 145, 156 (1879)]. *Reynolds* was decided some 87 years before the presumption of correctness for factual findings was added to 28 U.S.C. § 2254. The Court clearly did not attach the same significance to the phrase "a question of mixed law and fact" that we do today under modern habeas law. It recognized that juror-disqualification questions may raise both a question of law – whether the correct standard was applied –

> and a question of fact. Whether an opinion expressed by a juror was such as to meet the legal standard for disqualification was viewed as a question of fact as to which deference was due to the trial court's determination.

Id. at 1037 n.12.

The Court made a similar observation in *Wainwright v. Witt*, in applying the presumption of correctness to a trial court's decision to excuse a juror for cause because the juror's view on capital punishment would have prevented or substantially impaired the performance of his duty. "The trial judge is of course applying some kind of legal standard to what he sees and hears, but his predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record. These are the 'factual issues' that are subject to § 2254(d)." 469 U.S. at 429.

Similarly, the state judge's application of a constitutional standard of competency to stand trial to a particular defendant is subject to the presumption of correctness. So long as the state trial judge applies the correct legal standard to the subsidiary factual findings, the federal court must defer to the state trial judge's competency determination. *Maggio v. Fulford*, 462 U.S. at 113-117.

Section 2254(d)'s presumption also applies in the Sixth Amendment context. A state court judge deciding whether a defendant's right to counsel is violated when the defendant's statements to a jailhouse informant are admitted at trial must make a number of factual findings concerning what instructions the police gave to the

informant, whether the informant followed those instructions, what the informant said to the defendant, and what the defendant said to the informant. Based on these findings, the judge must then determine whether the defendant's statements were deliberately elicited. Notwithstanding the constitutional right involved, the Court held that the presumption of correctness applies to a state court's finding that police and their jailhouse informant did not deliberately elicit the defendant's incriminating responses. *Kuhlmann v. Wilson*, 477 U.S. 436, 460-61 (1986).

Thompson asserts that seven of the nine circuits that have considered the issue have characterized *Miranda* custody as a mixed question of fact and law, which the circuits review independently. He is mistaken.

The Ninth Circuit is not the only circuit which accords deference to the trial court's custody determination. As noted earlier, the Eighth Circuit and the Tenth Circuit also apply deferential standards of review in the habeas context: *Feltrop*, 46 F.3d at 773 (presumption of correctness); *Cordoba*, 910 F.2d at 693 (clear error).

On direct appeal, the circuits are split. The First, Second, Sixth, Seventh, Eighth, Ninth and Tenth Circuits have applied the deferential clearly erroneous standard of review to the district court's custody determination: *United States v. Lanni*, 951 F.2d 440, 441 (1st Cir. 1991); *United States v. Mitchell*, 966 F.2d 92, 98 (2nd Cir. 1992); *United States v. Mahar*, 801 F.2d 1477, 1500 & n.38 (6th Cir. 1986); *United States v. Levy*, 955 F.2d 1098, 1103 (7th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 102 (1992); *United States v. Griffin*, 922 F.2d 1343, 1347-48 (8th Cir. 1990); *United*

States v. Poole, 806 F.2d 853 (9th Cir. 1986); *United States v. Robertson*, 19 F.3d 1318 (10th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 271 (1994). The D.C. Circuit and the Third, Fifth and Eleventh Circuits have, without analysis, conducted plenary review: *United States v. Baird*, 851 F.2d 376, 379 (D.C. Cir. 1988); *United States v. Calisto*, 838 F.2d 711, 718 (3rd Cir. 1988); *United States v. Harrell*, 894 F.2d 120, 122-25 (5th Cir.), *cert. denied*, 498 U.S. 834 (1990); *United States v. Rioseco*, 845 F.2d 299, 302 (11th Cir. 1988).

Even if *Miranda* claims in general can properly be labeled mixed questions of fact and law, this does not mean that every subsidiary issue is reviewed independently on direct appeal or in the habeas context. The case of *Connecticut v. Barrett*, 479 U.S. 523 (1987), is illustrative. When the defendant was advised of his *Miranda* rights, he indicated that he understood his rights and that he had "no problem" giving an oral statement without an attorney, but he would not give a written one unless an attorney was present. The defendant proceeded to make oral incriminating statements. The Connecticut trial court found that the defendant understood his rights and that he had engaged in a limited invocation of his right to counsel. Based on these findings, the trial court admitted the statements at trial. The Connecticut Supreme Court reversed, ruling as a matter of law that the defendant's limited invocation of his right to counsel prohibited any interrogation.

In reversing Connecticut's highest court, the Court noted that the state court had decided an issue of law, the effect of the limited invocation on the police's ability to continue questioning. The Court did not independently

review the state trial court's subsidiary findings, based on credibility determinations, that the defendant understood his rights and that his invocation of his right to counsel was limited to written statements. 479 U.S. at 527-28 & n.1.

Applying *Barrett* to a claim that a person's rights under *Miranda* were violated when he was interviewed without warnings, leads to the conclusion that a trial court's ruling that the person was not entitled to warnings is a legal issue subject to independent review, while the trial court's subsidiary ruling that the person was not in custody is entitled to deference.

F. Considerations Of *Stare Decisis*, Congressional Intent, And The Nature Of The Inquiry Do Not Warrant Plenary Review

The reasons for holding that the voluntariness of a confession or a plea, the admissibility of a pretrial identification, and whether a defendant received effective assistance of counsel are subject to plenary review – *stare decisis*, congressional intent, and the nature of the inquiry – are not present in the *Miranda* context. The Court's most detailed discussion of the presumption of correctness and *de novo* review in the habeas context appears in *Miller v. Fenton*, which involved the voluntariness of a confession. The Court held that a state court's findings on subsidiary facts, such as the length of the interrogation, the defendant's prior experience with the legal system, and his familiarity with *Miranda* warnings, are entitled to the presumption of correctness. 474 U.S. at 117. The ultimate

voluntariness determination, however, is subject to plenary review. The Court reasoned that considerations of *stare decisis*, congressional intent, and the "uniquely legal dimension" of voluntariness warranted *de novo* review. More specifically, the Court noted that it had treated voluntariness as a legal conclusion for almost fifty years when Congress enacted § 2254(d) in 1966, and that Congress had modeled the habeas statute after *Townsend v. Sain*, which had assumed that the issue of voluntariness was subject to plenary review. *Miller v. Fenton*, 474 U.S. at 116-18. *See also Marshall v. Lonberger*, 459 U.S. at 431-35 (voluntariness of guilty plea reviewed *de novo*, but subsidiary questions of fact, such as whether defendant aware he was pleading to charge of attempted murder, subject to presumption of correctness); *Sumner v. Mata*, 455 U.S. 591, 597 (1982) (*per curiam*) (constitutionality of pretrial identification procedures independently reviewed, but findings of fact including whether the witnesses had an opportunity to observe the crime or were too distracted, whether the witnesses gave an accurate and detailed description, and whether the witnesses were under pressure from others, entitled to presumption); *Strickland v. Washington*, 466 U.S. 668, 697-98 (1984) (ineffective assistance of counsel claim involves mixed question of law and fact because claim "is an attack on the fundamental fairness of the proceedings whose result is being challenged").

The Court has never squarely addressed whether a trial court's determination of *Miranda* custody is entitled to deference on direct appeal or on habeas review; therefore, *stare decisis* has no application. *See Brecht v. Abrahamson*, ___ U.S. ___, 113 S.Ct. 1710, 1718 (1993) (*stare decisis*

does not preclude the Court from adopting less stringent harmless error test on habeas review because Court had never squarely addressed the issue). *See also Edelman v. Jordan*, 415 U.S. 651, 670-671 (1974). *Townsend v. Sain* did not involve a *Miranda* issue, nor did it allude to how *Miranda* issues would be treated. Since the Court decided *Miranda* in 1966, the same year Congress enacted § 2254(d), it can hardly be argued that Congress tacitly approved of plenary review of *Miranda* issues, let alone the custody determination.

The issue of *Miranda* custody does not involve a "uniquely legal dimension." The application of an objective reasonable person test does not transform the essentially factual determination into a legal one. For instance, the issue of negligence involves the application of a reasonable person standard to a particular set of facts and is treated as a question of fact. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990); *McAllister v. United States*, 348 U.S. 19, 20-22 (1954); 9A Wright and Miller, *Federal Practice and Procedure*, § 2590 (2nd ed. 1994).

The legal construct of the reasonable person is no stranger to criminal law. A jury evaluating a defendant's claim he acted in self-defense must decide whether a reasonable person in the defendant's position would have believed deadly force was necessary to avoid death or serious bodily harm. *See* W. LaFave and A. Scott, *Substantive Criminal Law*, § 5.7 (1986). Similarly, a defendant claiming he acted in the heat of passion must demonstrate that a reasonable person in his position would have acted as he did. *Id.* at § 7.10. Two of the common culpable mental states – recklessness and criminal negligence –

measure the accused's conduct against a reasonable person standard. *Id.* at § 3.7. Resolution of all of these issues involve the application a legal principle to the facts, and all are factual issues decided by the jury.

The concept of *Miranda* custody is not integral to due process. Voluntariness, pretrial identifications, and effective representation involve a "complex of values" which are not present in the *Miranda* context. *Miranda* is not rooted in fundamental fairness or due process. Nor did *Miranda* create rights in addition to those afforded by the Fifth Amendment. As the Court stated in *Michigan v. Tucker*, 417 U.S. 433 (1974):

> The Court recognized that these procedural safeguards [*Miranda* warnings] were not themselves rights protected by the Constitution, but were instead measures to insure that the right against compulsory incrimination was protected.

Id. at 444. *See also Roberts v. United States*, 445 U.S. 552, 560 (1980).

Since *Miranda* custody is not a standard expressly mandated by the Constitution, there are no compelling reasons to review the custody determination *de novo*. *Cf. Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989) (whether evidence is sufficient to support a finding of actual malice in a defamation case is a question of law because of the unique character of the First Amendment interest protected by the standard); *Bose Corp.*, 466 U.S. at 508 n.27 ("The simple fact is that First Amendment questions of 'constitutional fact' compel the Court's *de novo* review." (citations omitted)).

G. Principles Of Finality, Federalism And Fairness Dictate Application Of The Presumption Of Correctness To *Miranda* Custody Determinations

It must be remembered that the issue presented arises in the habeas context, not on direct appeal. States' interests in finality take on more significance in a collateral attack.

> When the process of direct review – which, if a federal question is involved, includes the right to petition for a writ of certiorari – comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of the federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums to relitigate state trials.

Barefoot v. Estelle, 463 U.S. 880, 887 (1983). *See also Engle v. Isaac*, 456 U.S. 107, 128 (1982) ("Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.").

Miranda is a prophy' ctic rule that requires suppression of voluntary confessions in the government's case-in-chief. *Miranda*, 384 U.S. at 467; *Fare v. Michael C.*, 442 U.S. 707, 718 (1979); *Tucker*, 417 U.S. at 444; *New York v. Quarles*, 467 U.S. 649, 654 (1984). "The *Miranda* exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation." *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985).

There are valid policy considerations for treating prophylactic rules like *Miranda* differently on collateral review than on direct appeal. *Duckworth v. Eagan*, 492 U.S. 195, 212 (1989) (O'Connor, J., concurring). Habeas corpus should be used to correct wrongs of constitutional dimension, not wrongs of lesser magnitude or violations of prophylactic rules. *Phillips*, 455 U.S. at 221; *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (purpose of habeas corpus is "to guard against extreme malfunctions in the state criminal justice systems") (Stevens, J., concurring in judgment).

State courts are fully qualified to apply the legal definition of custody. In fact, they have the superior vantage point because the trial judge can listen to the testimony regarding the various factual disputes and decide which witnesses to credit. Thompson has put forth no affirmative evidence that state-court judges are ignoring their oaths to uphold the Constitution and are misapplying *Miranda*. If anything, the *Miranda* cases the Court has decided in the last two decades indicate that state appellate judges are more likely to err on the side of requiring *Miranda* warnings where none are needed. Since 1969, the Court has overturned a number of state court decisions which erroneously required *Miranda* warnings, but has not reversed a state court which held that warnings were not required: *Stansbury*, 114 S.Ct. at 1531; *Perkins*, 496 U.S. at 297-98; *Bruder*, 488 U.S. at 10-12; *Mathiason*, 429 U.S. at 493; *Murphy*, 465 U.S. at 440; *Beheler*, 463 U.S. at 1126.

Treating *Miranda* custody as an issue of fact does not completely insulate the state court's determination. A reviewing court can overturn the custody finding when

the trial court has applied an erroneous legal standard. *Townsend v. Sain*, 372 U.S. at 315 n.10 (new trial may be ordered when trial judge applies erroneous standard of law in arriving at factual findings). So too, a reviewing court can overturn a custody finding when the trial court has applied the correct legal standard, but there are no facts in the record to support the trial court's conclusion. In habeas proceedings brought by state prisoners, a federal court can overturn a state court finding when it finds any one of the eight exemptions to the presumption of correctness listed in § 2254(d). *See* note 2, *supra*, p. 10.

The likelihood that an erroneous application of the custody standard to a particular set of circumstances will result in the admission of an involuntary and unreliable confession is virtually non-existent. A state prisoner can allege not only a violation of *Miranda*, but a due process claim that his confession was involuntary. *Withrow v. Williams*, ___ U.S. ___, 113 S.Ct. 1745, 1753 (1993). If the prisoner prevails on the due process claim, he will be entitled to relief. And, as noted earlier, the question whether the confession was voluntary will be reviewed *de novo*. *Miller v. Fenton*, 474 U.S. at 116-17. If, after independent review, the statement is found to be voluntary, no greater degree of reliability will be accomplished by subjecting the *Miranda* custody issue to *de novo* review as well.

Five courts – the Alaska Superior Court, the Alaska Court of Appeals, the Alaska Supreme Court, the United States District Court for the District of Alaska, and the Ninth Circuit Court of Appeals – have conducted an independent review of the record and have determined that Thompson's confession was voluntary. Thompson

has now abandoned the claim. The Alaska jury which found Thompson guilty did so on the basis of reliable evidence. Deference to the state court's finding that Thompson was not in *Miranda* custody could not have conceivably resulted in a grievous wrong. Because "*Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm," ordering a new trial in Thompson's case would vindicate no constitutional right. *Elstad*, 470 U.S. at 306-07. It would simply be an unjustified windfall.

II. Application Of The *De Novo* Standard Of Review Leads To The Conclusion That Thompson Was Not In Custody For *Miranda* Purposes When He Was Interviewed At The Trooper Office

Should the Court conclude that the Ninth Circuit erred in applying the presumption of correctness to the state court's finding that Thompson was not in custody for *Miranda* purposes, the case should be remanded to the Ninth Circuit for application of the *de novo* standard of review. However, the Court may wish to review the custody issue *de novo* and avoid deciding what standard of review applies because, even under the plenary standard of review, there is no doubt that Thompson was not in custody for *Miranda* purposes when he went to the trooper office.

The scenario in this case is virtually identical to those in *Beheler*, 463 U.S. 1121, and *Mathiason*, 429 U.S. 492. Beheler summoned the police to the scene of a shooting and told them his companion had killed the victim. Beheler agreed to accompany the police to the station to

discuss the murder, and he was specifically told he was not under arrest. The police did not administer the *Miranda* warnings. Beheler spoke with the police for approximately 30 minutes, during which time he was told that the prosecutor would be informed of his statement. Beheler then went home; he was arrested five days later. The California appellate court concluded that Beheler had been in *Miranda* custody because the interview occurred in the police station, the police had identified Beheler as a suspect, and the interview was designed to produce incriminating responses. However, the Court framed the question in *Beheler* as follows:

> The question presented in this petition for certiorari is whether *Miranda* warnings are required if the suspect is not placed under arrest, voluntarily comes to the police station, and is allowed to leave unhindered after a brief police interview.

463 U.S. at 1121. The Court went on to answer the question in the negative. *Id.* at 1124.

Mathiason, like Beheler, went to the police station in response to an officer's request. The police told Mathiason they believed he had burglarized a home, and they falsely told him his fingerprints were found at the scene. Mathiason then confessed to the burglary. The Oregon Supreme Court concluded Mathiason was in custody because the interrogation took place in a "coercive environment" and because the police lied about finding Mathiason's fingerprints. In reversing the state court, the Court focused not on the environment, but on the fact that Mathiason was not deprived of his freedom of action in any significant way. *Mathiason*, 429 U.S. at 493.

Thompson, like Beheler and Mathiason, was not placed under arrest prior to or during the interview. Thompson voluntarily appeared at the police station in response to a trooper's request. [JA 17] This was consistent with the prior two contacts he initiated with the troopers in which he expressed a desire to cooperate in the murder investigation. [JA 4, 11; Transcripts of telephone conversations between Thompson and Trooper Barnard on 9/11/86 at 5:11 p.m. and on 9/12/86 at 3:15 p.m.] Thompson did not feel compelled to immediately appear at the trooper office; he told the trooper that he was going to shower first. [Transcript of telephone conversation between Thompson and Trooper Stockard on 9/15/86 at 10:16 a.m.] Thompson drove his own vehicle, and he brought his dog with him. [JA 6, 26, 43, 78] At the end of the interview, he was given the option of calling a friend, calling a cab, or getting a ride from a trooper. Thompson accepted the trooper's offer and left the office unhindered. [JA 6, 78-79]

Thompson contends that there was a "coercive custodial environment" because the interview took place at the trooper office and the troopers used techniques designed to elicit incriminating responses. But these are the same factors the California and Oregon courts relied on in *Beheler* and *Mathiason*, which the Court found did not render Beheler in custody. As the Court recognized in *Mathiason*, "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that a police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." 429 U.S. at 495. *See also Murphy*, 465 U.S. at 430-31 (probationer who reported to

probation officer at officer's direction was not in *Miranda* custody).

Miranda was concerned about custodial situations which convey the message that the person has no choice but to confess. 384 U.S. at 456-57. "[T]he coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained." *Murphy*, 465 U.S. at 433. Thompson was interviewed by two troopers dressed in plain clothes with no visible weapons. [JA 6] Thompson was repeatedly told he could leave at any time. [JA 6, 27, 44-45, 49-52, 61, 74, 76-77]

That Trooper Stockard related to Thompson his belief that Thompson had murdered Dixie does not transform a non-custodial interview into a custodial one. "Even a clear statement from an officer that the person is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest." *Stansbury*, 114 S.Ct. at 1530. Because Trooper Stockard repeatedly told Thompson he was free to leave, a reasonable person in Thompson's shoes would have felt free to leave the trooper office despite Trooper Stockard's speculation about how he thought the murder had been committed. [JA 49-52, 61, 74, 76-77] Indeed, Thompson left the trooper office even after confessing to brutally stabbing Dixie. [JA 6, 78-79]

The fact that the trooper did most of the talking for a segment of the interview does not indicate custody. Thompson called the troopers on September 12, 1986, to find out how the investigation was coming along. [JA 4; Transcript of telephone conversation between Thompson

and Trooper Barnard on 9/12/86 at 3:15 p.m.]. His minimal responses during a portion of the interview are indicative of a desire to listen to find out how much the troopers knew about the murder and whether they were accepting his story about taking his former wife to the airport.

Trooper Stockard used techniques designed to elicit incriminating responses. But these do not give rise to custody, for "ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns." *Perkins*, 496 U.S. at 297. *See United States v. Collins*, 972 F.2d 1385, 1405-06 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1812 (1993) (rejecting claim that statements of FBI agents that the defendants were not under arrest and free to leave were "meaningless" in light of the fact the agents confronted the defendants with incriminating evidence; "Thus, while it may be true, as [one of the defendants] argues, that being confronted with adverse evidence or being told that one could be charged with a crime is 'designed to p[sy]c[h]ologically overcome [the interviewee's] ability to gather his thoughts and intelligently determine the circumstances,' does not transform the interview into a custodial situation.").

The fact that the troopers impounded Thompson's truck at the end of the interview and the fact that a trooper kept Thompson under surveillance during the two hours between the time he left the trooper office and his arrest do not warrant a conclusion that he was in custody for *Miranda* purposes during the interview. The troopers gave Thompson several options for transportation from the office, and he chose to have a trooper drive

him home. Accepting a ride from a police officer instead of calling a friend or cab was Thompson's choice. That choice did not render him in custody.

Thompson appears to be confusing the question of whether a reasonable person in Thompson's shoes would have believed he would be arrested at some point in the future with whether a reasonable person would have believed he was free to terminate the interview with Trooper Stockard. That a reasonable person, confronted by Trooper Stockard's recitation of the evidence against Thompson, would believe that some day he would be arrested and charged does not mean Thompson was entitled to *Miranda* warnings prior to the recitation.

Circuit courts of appeal have concluded that defendants in similar situations are not in custody for *Miranda* purposes. *See United States v. Fazio*, 914 F.2d 950, 955-56 (7th Cir. 1990) (applying *de novo* standard: defendant who voluntarily agreed to speak with police at the municipal building, who drove his own vehicle to the interview, who was never handcuffed and who never had a gun drawn on him, and who was told he was not under arrest and was free to leave at any time was not in custody); *Purvis*, 932 F.2d at 1419 (applying presumption of correctness to state court findings; defendant not in custody where he voluntarily went to police station and there were no physical restraints).

The Alaska court's determination that Thompson was not in *Miranda* custody was correct under both deferential and plenary review.

CONCLUSION

The Ninth Circuit Court of Appeals correctly applied the presumption of correctness to the Alaska court's determination that Thompson was not in custody for *Miranda* purposes. Therefore, the judgment of the Ninth Circuit should be affirmed. Alternatively, the petition for certiorari should be dismissed because Thompson was not in custody under any standard of review.

BRUCE M. BOTELHO
Attorney General

CYNTHIA M. HORA
Assistant Attorney General
Office of Special Prosecutions
and Appeals
310 K Street, Suite 308
Anchorage, Alaska 99501
Telephone: (907) 269-6250

Counsel for Respondents